NO. 14825

In the
United States
Court of Appeals
for the Ninth Circuit

GLEN T. JAMISON,
Director of Internal Revenue,
Appellant,

vs.

MARIA REPETTI,
Appellee.

On Appeal From The Judgment Of The United States District Court For The Northern District of California

Brief for the Appellee

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BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the District Court granting plaintiff-appellee's Motion for Summary Judgment, and its opinion and order denying defendant-appellant's Motion for Reconsideration are reported at 131 Fed. Sup. 626 and set forth in the transcript, beginning on pages 22 and 31, respectively.

JURISDICTIONAL STATEMENT

This appeal involves individual Federal income taxes and jurisdiction is conferred on this court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the assessment made by defendant-appellant was for a mathematical error which, under Section 272(f), 1939 I.R.C., relieves the defendant-appellant from the duty of issuing a statutory notice under Section 272(a), 1939 I.R.C.

2. If not a mathematical error, was the action of the District Court in granting the injunction proper under Section 272(a), 1939 I.R.C.

STATUTES INVOLVED

INTERNAL REVENUE CODE OF 1939:

SECTION 272. PROCEDURE IN GENERAL.

(a) (1) *Petition to The Tax Court of the United States.*

If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Nothwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court . . . . .

(f) *Further Deficiency Letters Restricted.* . . . If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered (for the purposes of this subsection, or of subsection (a) of this section, prohibiting assessment and collection until notice of deficiency has been mailed, or of section 322(c), prohibiting credits or refunds after petition to the Board of Tax Appeals) as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section.

SECTION 3640. ASSESSMENT AUTHORITY.

The Commissioner is authorized and required to make the inquiries, determinations and assessments of all taxes and penalties imposed by this title, or accruing under any former internal revenue law, where such taxes have not been duly paid by stamp at the time and in the manner provided by law.

STATEMENT OF THE CASE

The original complaint (Tr. page 3) was filed by plaintiff-appellee on November 5, 1953, seeking an injunction against defendant-appellant on the collection of assessments made by him on or about December 12, 1952, in accordance with the provisions of Section 272(f), 1939 I.R.C., copies of which notices of assessment were annexed to the complaint (Tr. pages 7 and 8). Motion by defendant-appellant to dismiss

(Tr. page 11) was denied on April 7, 1954 (Tr. page 12). On February 4, 1955, the District Court granted plaintiff-appellee's Motion for Summary Judgment (Tr. page 22), and on February 11, 1955, defendant-appellant moved for a rehearing (Tr. page 26) which was denied (Tr. page 31) on April 18, 1955, with an entry of judgment on June 21, 1955 (Tr. page 36).

FACTS OF THE CASE

The facts of the case as set forth by defendant-appellant in his brief under the heading of "Statement" on page 3, is a correct statement of the facts pertinent to this case.

ARGUMENT

Defendant-appellant does not argue that the assessment is valid as a "mathematical error" under Section 272(a), 1939 I.R.C. He seeks validity on the assertion without too much authority (Br. page 6) that Section 3640, 1939 I.R.C. sanctions any and all assessments of the Commissioner. Taxpayer contends that such Code section merely designates the Commissioner as the assessment officer for assessments otherwise provided, and the procedure therefore, in the Code. Defendant-appellant relies most strongly on the argument that the disputed liability was not a deficiency, hence denying to taxpayer the administrative procedure and right of appeal provided by Section 272(a) of the Internal Revenue Code. The District Court recognized the inherent abuse in such a rule.

It is noteworthy that most of defendant-appellant's brief is devoted to raising issues of law not here appropriate, and which was the very arbitrary action condemned by this Court in *Ventura Consolidated Oil Fields v. Rogan,* 86 F. 2d 149, Cert. Den. 300 U.S. 672, relied upon by the District Court in this case (Tr. page 25). This diversionary tactic is comparable to defendant-appellant's threat in the District Court (Tr. page 34) to re-assess under the new 1954 Code in order to make that and this Court's action moot.

If the assessment was not proper under Section 272(f), 1939 I.R.C., is it *per se* invalid, or can the defendant-appellant now cure the defect by resorting to the claim of a general power of assessment under Section 3640, 1939 I.R.C., merely because the Commissioner is designated as the assessment officer? Section 271, relied upon by the defendant-appellant, grants no assessment authority, and no other is suggested by the defendant-appellant.

The contention that Section 271(b) (1), 1939 I.R.C., bars the credit against tax for carry-over from previous years was well answered by the District Court (Tr. page 3). That section relates to the fact of current payments, and not to overpayment of taxes that the taxpayer elects on his return to take either as a refund or as a reduction of the succeeding year's tax liability. If he elects the latter, as in this case (carry-over until absorbed) and by such action raises the issue of the bar of the statute of limitations (Br. page 11, Argument II),

then such issue is one of law and not of fact under Section 271(b) (1), 1939 I.R.C. The issue is not whether the payment was made, but whether taxpayer is entitled to the credit—one of many provided in the Code.

Defendant-appellant's reference to *United States v. Erie Forge,* 191 F. 2d 627 (CA3d) (Br. page 9) is not appropriate, as that case involved the delinquency penalty under Section 291. The Court found that such a penalty was not a deficiency, saying that "in order to decide as we do it is only necessary to consider the language of the section which imposes these penalties and prescribes their method of selection." There follows an analysis by the Court of Sections 291 and 293, 1939 I.R.C., which determines the Court's opinion in that case.

There is no doubt but that the issue of whether the taxpayer is entitled to the carry-over credit of the estimated tax payment is a question of law. According to the position of the defendant-appellant, the taxpayer here is completely without any redress unless she were to pay the amount claimed by the defendant-appellant and file claim for refund. Defendant-appellant argues that the issuance of the statutory notice under Section 272(a) would be futile because the Tax Court would be without jurisdiction (Br. page 13). Such a position negates the very purpose and justification of the Tax Court. Defendant-appellant's argument would have us believe that there are two methods of asserting additional tax liability — one method for a class that can

be challenged *only* after claim for refund followed by suit in the district court, and the other for a class which may *in addition* be tried in the Tax Court pursuant to Section 272(a).

We fail to find statutory authority for such a position.

The issues raised by defendant-appellant in Argument II. and III. (Br. pages 11 and 13) are not properly before this Court, intended, no doubt, to demonstrate the futility of this Court's action should it affirm the District Court's order. It is respectfully suggested that the proper procedure to test defendant-appellant's argument is to give him the opportunity to issue the statutory notice under Section 272(a), 1939 I.R.C., and if it is improper, the Tax Court will recognize it and rule accordingly. Appellee does not agree with defendant-appellant's position, but does not want to acquiesce by argument in this diversion from the proper issues before this Court, principally whether this particular assessment was valid.

SUMMARY

The facts in this case clearly indicate that defendant-appellant erred in his choice of authority for the assessment by claiming it was a mathematical assessment under Section 272(f), and that such assessment is, therefore, invalid. He now seeks to justify the assessment on the ground that he had the authority to make any assessment under Section 3640, 1939 I.R.C. without regard to any other provi-

sions of the Internal Revenue Code. In addition, he argues that Section 272(a), 1939 I.R.C., which affords a protection to the taxpayer from arbitrary assessment is not appropriate because that particular section requires a "deficiency", whereas this particular assessment is not a "deficiency", as defined in Section 271, 1939 I.R.C. Under the facts of this case, we submit that such rationale clearly supports the opinion of the lower court that defendant-appellant's actions were intended to frustrate the Internal Revenue Code by denying to the taxpayer his right to administrative procedure and to litigate before the Tax Court. Defendant-appellant clearly admits that whether plaintiff-appellee is entitled to the carry-over credit for estimated tax is a matter of law, and there is no question of the fact of payments, which really is the subject of Section 271 (b) (1), 1939 I.R.C. Unless Section 3640, 1939 I.R.C. endows the defendant-appellant with the right to assess without restriction, defendant-appellant has failed to show any statutory authority for making the assessment, either indirectly or directly.

DATED at Stockton, California, this first day of November, 1955.

Respectfully submitted,

SEAMAN & DICK,
By Wareham Seaman
(Attorneys for Appellee)